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2005 FEB -4 P 4: 52

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5542

DATE COMPLAINT FILED: September 24, 2004

DATE OF NOTIFICATION: October 1, 2004

DATE ACTIVATED: October 20, 2004

EXPIRATION OF SOL: August 31, 2009

COMPLAINANTS:

Democracy 21
Campaign Legal Center
Center for Responsive Politics

RESPONDENT:

Texans for Truth

RELEVANT STATUTES:

2 U.S.C. § 431(4)
2 U.S.C. § 431(8)
2 U.S.C. § 433
2 U.S.C. § 434
2 U.S.C. § 441a(f)
2 U.S.C. § 441b(a)

INTERNAL REPORTS CHECKED:

Disclosure reports; Commission indices

FEDERAL AGENCIES CHECKED:

Internal Revenue Service

I. INTRODUCTION

This matter concerns allegations that Texans for Truth ("TFT"), an entity organized under Section 527 of the Internal Revenue Code, has violated various provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). The complaint alleges that TFT is a federal political committee as defined by the Act which has failed to register and report with the Commission and failed to comply with the Act's contribution limits and source prohibitions.

1 TFT has not registered as a political committee and in its response denies being a political
2 committee. Response at 1-2.¹

3 The allegations in this matter are similar to the allegations made against the Section 527
4 organizations at issue in MURs 5403, 5427, 5440, 5466 and 5487. This Report examines the
5 potential violations by TFT in a manner similar to the analysis set forth in the comprehensive
6 MURs 5403, 5427, 5440 and 5466 First General Counsel's Report submitted to the Commission
7 on August 2, 2004, as clarified in the Factual and Legal Analyses approved on September 28,
8 2004, and in the MUR 5487 First General Counsel's Report dated November 12, 2004. TFT has
9 a significant relationship to MoveOn.org, whose Section 527 organization, MoveOn.org Voter
10 Fund ("MOVF"), and whose PAC, MoveOn PAC, are both respondents in MUR 5440. Based on
11 available information discussed below, this Office recommends that the Commission find reason
12 to believe that TFT has violated the Act and authorize the use of compulsory process for an
13 investigation.

14 **II. FACTS**²

15 TFT was formed on August 31, 2004. TFT's stated purpose on its registration with the
16 Internal Revenue Service ("IRS") is to "educate voters on the records and views of candidates

¹ The complaint does not specifically allege that TFT coordinated its advertisements with the Kerry campaign or the Democratic National Committee. The subject of coordination is noted in a press article attached to the complaint, in which the White House Press Secretary generally alleged coordination between TFT and the Kerry campaign, which was denied by both parties. Howard Witt and John McCormick, *Agile "527" Groups Lead Well-funded Hit-run War*, CHICAGO TRIBUNE, September 10, 2004, at 1. Another article, not attached to the complaint, stated that TFT produced its advertisements attacking President Bush's National Guard service "just as the Democratic National Committee unveiled a campaign with the same thrust," but provided no additional information. John Riley, *527s on the Campaign Trail*, NEWSDAY, October 7, 2004, at A4. TFT's response, while noting that the complaint did not allege coordination, addressed the issue by stating that it did not coordinate its advertisements with either the Kerry campaign or the DNC. Response at 10.

² See Factual Appendix at Attachment A.

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1 for public office and to promote interest in political issues and participation in elections.”³
2 TFT’s website page “About Us,” however, mentioned only a single candidate: “Texans for
3 Truth, an organization from Bush’s home state, believe time has come [sic] for America to learn
4 the truth about Bush’s shadowy past.”⁴ Further, TFT was reportedly created to respond to Swift
5 Boat Veterans for Truth, the group of Vietnam veterans backed by prominent Texas Republican
6 donors who launched a television commercial in early August 2004 alleging that Senator Kerry
7 lied about his decorated Vietnam service.⁵

8 TFT is the Section 527 arm of DriveDemocracy, a non-profit Texas corporation launched
9 in April 2004. DriveDemocracy, in turn, was initially funded through a grant from
10 MoveOn.org.⁶ Funds were initially raised for TFT through a mass e-mail from MOVF to
11 MoveOn members in Texas and to the members of DriveDemocracy.⁷ Attachment C. This e-
12 mail, titled “Where was Bush? Help expose truth [sic] of his service record,” is dated
13 September 7, 2004 and undersigned by Wes Boyd, MoveOn.org Voter Fund.⁸ Mr. Boyd begins:

14 The Bush Campaign took a huge risk last week: rather than focus on issues or
15 vision at their convention, they attacked John Kerry where he is strong and where
16 they are weak. This isn't surprising. Big lies have become a trademark strategy
17 of the Bush administration and now the Bush campaign. However, lies come
18 back to haunt.
19

³ See TFT’s IRS form 8871, which does not list any related entity.

⁴ See Attachment B, page 8. The quoted statement was formerly posted at <http://texansfortruth.com/about.html>. TFT’s website was taken down in January 2005. Pages from TFT’s website are found at Attachment B.

⁵ Howard Witt and John McCormick, *Agile “527” Groups Lead Well-funded Hit-run War*, CHICAGO TRIBUNE, September 10, 2004, at 1.

⁶ See Attachment B, page 2; <http://drivedemocracy.org/about.html>

⁷ Press articles describe the mass e-mail campaign as sent out in part by the MOVF, but do not identify other parties. In addition, MoveOn.org had a link to TFT on its website.

⁸ Mr. Boyd is co-founder, president and board member of MoveOn.org and treasurer of MOVF. See MURs 5403, 5427, 5440 and 5466 First General Counsel’s Report dated August 2, 2004, at 20-21 and Attachment H.

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1 In this case, smearing John Kerry about his service in Vietnam has brought focus
2 back on Bush's embarrassing evasion of service. Today, a group in Texas,
3 Texans for Truth, is launching an ad campaign that highlights Bush's absence
4 from duty in 1972. The first ad, featuring a National Guardsman at the base
5 where Bush was supposedly posted, will air as soon as Texans for Truth can raise
6 their \$200,000 budget for the ad.

7
8 Let's help get this ad on the air now. You can make this possible by going to

9
10 <http://www.texansfortruth.com/contribute.html>

11
12 *Id.* Mr. Boyd goes on to describe the TFT advertisement⁹ and state that "[s]purred by Bush's
13 cynical and ugly attacks on Kerry, people who have never spoken before have now begun to
14 come forward to talk about this period in Bush's career." *Id.* Finally, Mr. Boyd notes that TFT
15 is run by "our friend Glenn Smith, who also runs an affiliated 20,000 member Texas-based
16 advocacy group called DriveDemocracy.org." *Id.*

17 Mr. Smith reportedly founded both TFT and DriveDemocracy. Mr. Smith is treasurer
18 and Executive Director of TFT and is the Director of DriveDemocracy.¹⁰ In addition, Mr. Smith
19 helped manage MoveOn's "Defending Democracy" campaign regarding the congressional
20 redistricting in Texas. Defending Democracy's remaining proceeds served as MoveOn.org's
21 grant to DriveDemocracy.

22 In its filings with the IRS covering the period August 31 through November 22, 2004,
23 TFT lists itemized receipts of \$225,495 and disbursements of \$486,929. In three electioneering
24 communication reports filed with the Commission, TFT lists \$155,000 in donations received and
25 \$303,000 in electioneering communications made covering the period from September 13

⁹ The advertisement described is titled "AWOL" and is one of the three TFT advertisements transcribed at Attachment A, pages 3-5.

¹⁰ Mr. Smith was notified of the complaint as treasurer of TFT. This Office makes no recommendation as to Mr. Smith at this time.

1 through October 20, 2004.¹¹ According to a statement on DriveDemocracy's website dated
2 September 12, 2004, two weeks after TFT was formed and just five days after the MOVF
3 solicitation, TFT had raised \$400,000 from 6,300 individuals.¹²

4 TFT solicited donations on its website. Before the November 2004 election, the webpage
5 soliciting donations to TFT specifically stated that a donor's contribution "will help us put the
6 Texans for Truth TV ad on the air in key swing states across the nation."¹³ See Attachment B,
7 page 6. The webpage also contained the statement:

8
9 By contributing you certify the following:

10
11 My contribution is from my own funds, by credit card, for which I have a legal obligation
12 to pay. The funds are not from an incorporated source, and the contribution is not made
13 by any prohibited source, including: the general treasury funds of corporations, labor
14 organizations, or national banks (including corporate or company credit cards); any
15 person contributing another person's funds; foreign nationals who lack permanent
16 resident status; and government contractors.

17
18 If you're under 18 years old: I am contributing knowingly and voluntarily, the funds are
19 my own, and the contribution is not controlled by another individual or made from the
20 proceeds of a gift given to provide funds to be contributed.

21
22 I understand that contributions to Texans for Truth are not tax deductible.

23
24 See *id.*

¹¹ TFT disclosed receiving a \$100,000 donation from one individual. TFT's next largest donation was \$10,000 from an LLC entity. TFT disclosed no other donations larger than \$5,000, although one donor gave multiple donations aggregating to \$6,000.

¹² <http://www.drivedemocracy.org/blog/index.php?m=200409>. The variations in the reported figures appear to be due to disclosure thresholds. The Act provides for the disclosure of donations of \$1,000 or greater for electioneering communications. See 2 U.S.C. § 434(f)(2)(E) and (F). The Internal Revenue Code ("IRC") provides for the disclosure of donations to section 527 organizations by donors who give an aggregate of \$200 or more to the organization during a calendar year. See 26 U.S.C. § 527(j)(3)(B). Neither statute requires the disclosure of total donations. Cf. 2 U.S.C. § 434(b)(2). Glenn Smith reportedly stated that of the initial \$300,000 raised by TFT, aside from the \$100,000 donation, most of the rest came in \$25 donations. Katharine Seelye and Ralph Blumenthal, *Documents Suggest Special Treatment for Bush in Guard*, NEW YORK TIMES, September 9, 2004.

¹³ This statement appeared at <http://texansfortruth.com/contribute.html> until the election.

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TFT ran three television advertisements criticizing President Bush's National Guard service.¹⁴ The advertisements do not mention Senator Kerry or the 2004 election. For example, the following advertisement entitled "Honor" was paid for by TFT:

<i>Audio</i>	<i>Video</i>
ANNOUNCER: Today under President Bush's order National Guardsmen are fighting and dying in Iraq. Serving their country with courage and honor.	<i>On screen: Still photos of soldiers, military vehicles, a soldier being carried in a stretcher, and a burning vehicle. Small text below: www.texansfortruth.org¹⁵</i>
George Bush walked away from his duty to the nation and to the National Guard.	<i>On screen: Still photo of a young George W. Bush in military uniform climbing into an airplane</i> <i>On screen: image of George W. Bush darkens</i>
His father got him into the Guard and out of the Guard.	<i>On screen: Still photo of a young George W. Bush and his father, George H.W. Bush</i>
Mr. President you owe our troops an explanation.	<i>On screen: Still photo of a young George W. Bush next to text: MR. PRESIDENT YOU OWE OUR TROOPS AN EXPLANATION.</i>
You pledged to release all of your military records but you have not signed the papers to do so.	<i>On screen: Still photo of President Bush next to text: Q: "BUT YOU AUTHORIZE THE RELEASE OF EVERYTHING TO SETTLE THIS?" BUSH: "YES, ABSOLUTELY." Source: Meet the Press, Feb. 8, 2004.</i>
Sign them now. Keep your word. Choose honor.	<i>On screen: SIGN THEM NOW. Superimposed over a form titled "Request Pertaining to Military Records" and a blank "Signature" field.</i>
Texans for Truth is responsible for the content of this advertisement.	<i>On screen: CHOOSE HONOR. Smaller print below: Paid for by Texans for Truth, www.texansfortruth.org, not authorized by</i>

¹⁴ The advertisements were available at <http://texansfortruth.com/watch.html>. See Attachment B, pages 4-5 and 7. Transcripts of the audio and video are set forth at Attachment A at 3-5.

¹⁵ This text remains in place throughout the advertisement.

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	any candidate or candidate's committee. Texans for Truth is responsible for the content of this advertisement.
--	--

1
2 TFT's disclosed disbursements and other public information including its website do not indicate
3 any additional television advertisements.¹⁶

4 It appears that TFT's primary activity was to fund television advertisements which
5 clearly identify then-Republican Presidential candidate George Bush. All three of the TFT
6 advertisements criticize President Bush's National Guard service. TFT's disbursements for these
7 advertisements were made within 60 days of the general election and so would qualify as
8 electioneering communications if TFT was not a political committee. See 2 U.S.C.
9 § 434(f)(3)(A)(i). Accordingly, the three electioneering communication reports TFT filed with
10 the Commission list just one candidate, President Bush. See 2 U.S.C. § 434(f)(2)(D). There was
11 no information on the TFT website about any other candidates for federal, state or local office.

12 **III. ANALYSIS**

13 It appears that TFT may be a "political committee" subject to the contribution limitations,
14 source prohibitions, and reporting requirements of the Act. See 2 U.S.C. §§ 431(4)(A), 433, 434,
15 441a and 441b. The Act defines a "political committee" as any committee, club, association, or
16 other group of persons that receives "contributions" or makes "expenditures" for the purpose of
17 influencing a federal election which aggregate in excess of \$1,000 during a calendar year.

¹⁶ TFT's website contained an advertisement for a book, *Unfit Commander: Texans for Truth Take On George W. Bush*. See Attachment B, pages 4 and 9. TFT's reports to the IRS, which disclose disbursements beyond those disclosed to the Commission relating to electioneering communications, do not indicate any payments to publish this book. Thus, we have not included in this Report an analysis of whether TFT payments regarding the book might constitute expenditures. See 2 U.S.C. § 431(9). In addition, TFT's IRS reports do not indicate any public communications other than the three television advertisements, see 2 U.S.C. § 431(22), or any voter drive activity. We will inform the Commission as appropriate if information showing additional TFT activity is uncovered during the recommended investigation.

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1 2 U.S.C. § 431(4)(A). The term "contribution" is defined to include any gift, subscription, loan,
2 advance, or deposit of money or anything of value made by any person for the purpose of
3 influencing any election for Federal office. 2 U.S.C. § 431(8)(A)(i). *See, e.g., FEC v. Survival*
4 *Educ. Fund, Inc.*, 65 F.3d 285, 295 (2nd Cir. 1995) (where a statement in a solicitation "leaves
5 no doubt that the funds contributed would be used to advocate [a candidate's election or] defeat
6 at the polls, not simply to criticize his policies during the election year," proceeds from that
7 solicitation are contributions).

8 TFT is a Section 527 organization that files reports with the IRS. By law, a 527
9 organization is "a party, committee, association, fund, or other organization (whether or not
10 incorporated) organized and operated primarily for the purpose of directly or indirectly accepting
11 contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1).
12 The "exempt function" of 527 organizations is the "function of influencing or attempting to
13 influence the selection, nomination, election or appointment of any individual to any Federal,
14 State, or local public office or office in a political organization," or the election or selection of
15 presidential or vice presidential electors. 26 U.S.C. § 527(e)(2). As a factual matter, therefore,
16 an organization that avails itself of 527 status has effectively declared that its primary purpose is
17 influencing elections of one kind or another.

18 While TFT claims that its purpose is to "educate voters on the records and views of
19 candidates for public office and to promote interest in political issues and participation in
20 elections,"¹⁷ the available information does not show any TFT statement regarding any specific
21 state or local candidate, or for that matter, any federal candidate other than President Bush. In
22 fact, its website and fundraising solicitations point to an intention to influence the 2004

¹⁷ This statement appears on TFT's IRS form 8871.

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1 presidential election. As noted above, TFT was reportedly formed to respond to Swift Boat
2 Veterans for Truth's advertisement criticizing Senator Kerry, and TFT's website described the
3 organization as believing the "time has come for America to learn the truth about Bush's
4 shadowy past." TFT focused its activities and operated in "swing states," where the presidential
5 election was most competitive. A TFT press release stated that its initial advertisement buys
6 were in Harrisburg, PA; Columbus, OH; Detroit, MI; Portland, OR and Phoenix, AZ.¹⁸

7 TFT states in its Response that it has never run an advertisement containing express
8 advocacy of the election or defeat of any candidate. Response at 9. TFT also denies that there is
9 a basis in the language of its press release for a finding that TFT made any expenditure. *Id.*; see
10 Attachment B, pages 1-3.

11 Even if both of TFT's assertions are true, however, TFT's activity may nonetheless
12 satisfy the criteria for political committee status. See 2 U.S.C. § 431(4)(A). TFT's response
13 mentions neither its own solicitation for donations on its website nor MOVF's solicitation on
14 TFT's behalf. Although TFT's website solicitation contained an advisory regarding donated
15 funds that appears to limit such funds to those permissible for making electioneering
16 communications, *see* 2 U.S.C. § 441b, the sole statement on the donations page regarding the use
17 of funds received by TFT points to an intention to influence the presidential election: "Your
18 donation will help us put the Texans for Truth TV ad on the air in key swing states across the
19 nation."¹⁹ See Attachment B, page 6. In fact, TFT's website was replete with expressions of an
20 intention to defeat President Bush:

¹⁸ See Attachment B, page 2.

¹⁹ As noted above, TFT disclosed the receipt of a \$10,000 donation from an LLC, an entity treated under the Commission's regulations as a corporation if it elects to be treated as a corporation by the IRS. See 11 C.F.R. § 110.1(g). Such a corporate donation would be prohibited by Section 441b.

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- 1 • “[The] time has come for America to learn the truth about Bush’s shadowy
2 past”;²⁰
- 3 • “The ad, paid for by online donations, will begin airing [September 13, 2004] in
4 swing states communities who’ve sustained the most losses in Iraq.”²¹
- 5 • an advertisement for a book, *Unfit Commander: Texans for Truth Take On*
6 *George W. Bush*;²² and
- 7 • the donations page contained a link to the advertisements that would be paid for
8 with the donors’ funds, advertisements featuring President Bush;²³ thus showing
9 that “swing states across the nation” referred to the 2004 presidential election.

10 As shown, TFT’s own solicitation leaves no doubt that the funds raised would be used to
11 broadcast an advertisement intended to influence the Presidential election “in key swing states.”

12 Thus, proceeds from that solicitation are contributions. *See Survival Educ. Fund*, 65 F.3d at 295;
13 2 U.S.C. § 431(8)(A)(i). Similarly, the MOVF solicitation that raised funds for TFT begins:

14 The Bush Campaign took a huge risk last week: rather than focus on issues or
15 vision at their convention, they attacked John Kerry where he is strong and where
16 they are weak. This isn’t surprising. Big lies have become a trademark strategy
17 of the Bush administration and now the Bush campaign. However, lies come
18 back to haunt.

19
20 Attachment C. These references to Bush “campaign” strategy and to the “convention” leave no
21 doubt that the solicited funds would be used to defeat President Bush. The solicitation goes on to
22 criticize the Bush campaign for “smearing” John Kerry about his military service in Vietnam,
23 announce TFT’s advertising campaign highlighting President “Bush’s absence from [National

²⁰ See Attachment B, page 8.

²¹ See Attachment B, page 1.

²² See Attachment B, pages 4 and 9.

²³ See Attachment B, page 6.

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1 Guard] duty in 1972" and state that the first advertisement will air "as soon as Texans for Truth
2 can raise their \$200,000 budget for the ad. Let's help get this ad on the air." Attachment C.
3 TFT's advertisement text is incorporated into MOVF's solicitation which refers to "Bush's
4 cynical and ugly attacks on Kerry" and goes on to further reference the Bush campaign's
5 "stonewalling on details of the President's service." *Id.* Thus, the solicitation informs potential
6 donors that the funds contributed would be used to advocate President Bush's defeat at the polls,
7 not simply to criticize President Bush's policies. *See Survival Educ. Fund*, 65 F.3d at 295.
8 Therefore, the proceeds from that solicitation would be contributions to TFT.²⁴ *See id.*

9 The available information demonstrates that the objective of TFT was to influence the
10 2004 presidential election and TFT apparently raised and spent hundreds of thousands of dollars
11 in furtherance of that objective. In this circumstance, it is appropriate for the Commission to
12 investigate whether, among those funds spent and received, TFT received \$1,000 in
13 "contributions" or made \$1,000 in "expenditures." If it did, TFT is a political committee subject
14 to the contribution limitations, source prohibitions, and reporting requirements of the Act.²⁵ *See*
15 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b.

16 Therefore, this Office recommends that the Commission find reason to believe that TFT
17 violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee
18 with the Commission; by failing to report its contributions and expenditures; by knowingly

²⁴ As noted above, the solicitation reportedly raised over \$300,000 in 24 hours and \$400,000 within a few days. These figures make up the bulk of the \$486,929 that TFT disclosed spending during September-November 2004.

²⁵ To address overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986). TFT's response to the complaint asserts that there is no statutory or regulatory basis for applying a "major purpose" test to the definition of "political committee." Response at 8.

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1 accepting contributions in excess of \$5,000; and by knowingly accepting corporate and/or union
2 contributions.²⁶

3 **IV. PROPOSED DISCOVERY**

4 Because the allegations in this matter are similar to those raised in MURs 5403, 5427,
5 5440, 5466 and 5487, and in light of the connection between TFT and MoveOn.org, this Office
6 intends to coordinate the investigation in this case with the investigation in those other MURs.
7 To that end, this Office seeks authorization to issue subpoenas for answers to written questions,
8 production of documents, and depositions directed to representatives of TFT and witnesses in
9 this matter. Although we appear to have a fairly complete picture of TFT's activity, the
10 discovery will seek to confirm this picture.

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18 Accordingly, this Office requests that the Commission authorize the use of compulsory
19 process, including the issuance of appropriate subpoenas to TFT and the issuance of appropriate
20 additional interrogatories, document subpoenas, and deposition subpoenas, as necessary.

21

²⁶ The relationship between TFT and MOVF also raises the issue of possible affiliation between the two entities. See 2 U.S.C. § 441a(a)(5) and 11 C.F.R. §§ 110.5(g) and 110.3(a). We will make additional recommendations as appropriate if information supporting affiliation is uncovered during the recommended investigation.

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V. RECOMMENDATIONS

1. Find reason to believe that Texans for Truth violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee with the Commission, by failing to report contributions and expenditures, by knowingly accepting contributions in excess of \$5,000, and by knowingly accepting corporate and/or union contributions;
2. Approve the attached Factual and Legal Analysis;
3. Authorize the use of compulsory process with respect to respondent and all witnesses, including the issuance of appropriate interrogatories, document subpoenas, and deposition subpoenas, as necessary; and
4. Approve the appropriate letter.

2/4/05
Date

Lawrence H. Norton
Lawrence H. Norton
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Lawrence L. Calvert Jr.
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Deputy Associate General Counsel
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Attachments

- B. Texans for Truth website pages
- C. MoveOn.org Voter Fund solicitation on behalf of Texans for Truth